

Jumawan (Migration) [2018] AATA 4743 (9 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Ms Mylen Banzon Jumawan
CASE NUMBER: 1714313
DIBP REFERENCE(S): BCC2016/635401
MEMBER: Adrienne Millbank
DATE: 9 October 2018
PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A

Statement made on 09 October 2018 at 12:12pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) – Subclass 801 (Spouse) – evidence of relationship – lived together in Australia for 3 years – established a joint household – shared lifestyle – no significant joint assets – sponsor financially supports applicant – money sent to applicant’s dependent – communicate with applicant’s family via Skype – credible witnesses – supporting statements from family and friends – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A Schedule 2 cl 820.211, 820.221

CASES

Paduano v MIMIA [2005] FCA 211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 30 June 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant was born in the Philippines in 1971 and is 46 years old at the time of decision. She declared one previous marriage, which ended in separation in 2002. She has three children from this marriage, born in 1990, 1994 and 2000. The sponsor was born in Morwell, Victoria in 1952 and is 66 years old at the time of decision. He declared one previous de facto relationship, which ended in 1986. He has one adult child from this relationship.
3. The parties claim they met each other on 28 February 2011, in a spa at the airport in Kuala Lumpur, Malaysia, where the applicant was working as a masseuse. The sponsor regularly travelled through Kuala Lumpur, on his way to places like Bali, as a representative for Australian surfing-goods businesses, and obtained massages to alleviate pain and stiffness in his neck and back from old surfing injuries. The parties exchanged contact details, and communicated for five years over the phone and through Skype, while the applicant worked in Malaysia to provide for children in the Philippines. The applicant agreed to join him in Australia after her son graduated from college in March 2015. She first arrived in Australia on 19 October 2015, on a Visitor visa.
4. At the time the applicant applied for the visa, on 14 February 2016, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
5. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a). The Delegate considered the evidence and information provided in relation to the matters prescribed under regulations 1.15A and 1.09A insufficient to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under section 5F and 5CB of the Migration Act. The Delegate was also not satisfied that the applicant had been in a de facto relationship for 12 months prior to the date of application. No materials or arguments had been provided addressing the waiver of the 12 month de facto relationship requirement, and the Delegate was not satisfied that compelling reasons existed for the grant of the visa.
6. The applicant appeared before the Tribunal on 24 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and two supporting witnesses, a neighbour of the parties and the sponsor's solicitor and friend of ten years.
7. Further documents were provided to the Tribunal following the hearing, on 27 September 2018 and 28 September 2018.
8. At hearing the applicant and the sponsor provided consistent oral evidence, in an open fashion, about their relationship, and the Tribunal found their testimony credible and compelling. The Tribunal also found the oral testimony provided by the supporting witnesses credible and convincing. The Tribunal notes that this is a case where more evidence and information about the circumstances of the parties was available to the Tribunal than was available to the Delegate.

9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issues in the present case are whether the applicant was in a genuine de facto relationship with the sponsor at the time of application and decision, and, if so, whether they were in a genuine de facto relationship 12 months prior to the date of application.
11. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
12. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
13. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

Financial aspects of the relationship

14. The parties provided evidence that they opened a joint bank account, but advised that they have barely used it. In statutory declarations and at hearing, the sponsor testified that he has fully supported the applicant, financially, since her arrival in Australia in October 2015. He advised, and the evidence supports, that household expenses including grocery shopping, utilities and medical expenses, are paid for through his account, while the applicant's earnings from casual cleaning work and the sale of her vegetables at markets, are deposited into her account. (The parties are both vegetarians who grow much of their own food, and the applicant sells surplus produce through farmers' markets.) The applicant advised that she sends money to her mother and her one remaining dependent daughter in the Philippines, from her account.
15. The sponsor advised, and the applicant confirmed, that the applicant was determined from the time they entered into a relationship in 2011, to support her children without entering into a dependency-type relationship with him, and refused his requests to live with him until after her son graduated from military training, as a marine, in the Philippines, in 2015. Evidence was provided that the sponsor sent money to the applicant, several hundred dollars at a time, on an irregular basis, to support the applicant after she left her employment in Malaysia and returned to the Philippines, in March 2015, and waited to renew her passport and join him in Australia.
16. Evidence was provided that the applicant has a car registered in her own name. When asked about any joint ownership of assets, joint liabilities or legal obligations owed to the other party, the sponsor advised that he and the applicant have recently purchased a house on acreage in a rural hamlet in northern NSW near a beach, but that it has been purchased in his name only. He explained that he wanted and intended the property they chose

together to be in joint names, but his solicitor advised that this would incur an extra \$20,000 in NSW stamp duty. The sponsor's solicitor confirmed, in testimony provided to the Tribunal over the phone, at hearing, that he provided this advice, and that the sponsor had wanted and intended to purchase the house and land in joint names.

17. The sponsor advised that he does not have money invested in a superannuation account, or a Will, but that any assets, including the recently-purchased property, would go to the applicant, as his partner.
18. While the parties do not have joint ownership of real estate or other significant assets, joint liabilities or legal obligations owed to the other party, the Tribunal is satisfied that they have pooled their financial resources and that they share day-to-day household expenses commensurate with being in a de facto relationship.

Nature of the household

19. Mail addressed to both parties, photos of the parties at home, and statutory declarations and letters from supporting witnesses, shows that the parties lived together since October 2015.
20. Statutory declarations and written statements, including from family members of the sponsor who have stayed with them, and neighbours, attest that the parties have lived together as a couple since October 2015, and that they have recently moved to a property that they chose together to suit their lifestyle and plans (The parties are vegetarian and grow much of their own food). A letter of support was provided by a Justice of the Peace, stating that she knew the parties to have lived together since 2015.
21. The applicant in written statements and at hearing described how she did most of the cooking but the sponsor assisted, and that they did the cleaning and shopping together. The sponsor is retired, and stated that they do most things together.
22. The parties' children are adults, and they have not shared responsibility for the care and support of children in their household.
23. The Tribunal is satisfied, on the evidence available, that the parties have established a joint household where they live together as a de facto couple, sharing the housework.

Social aspects of the relationship

24. A large number of statutory declarations and written statements were provided by friends, acquaintances, neighbours and family members of the sponsor, many lengthy and detailed, indicating they socialised with the parties, and knew them to be a committed couple. Photos were provided showing the parties with friends and family. The applicant advised that in terms of social activities, these mostly comprised neighbours dropping in and regular get-togethers with the sponsor's surfing mates. One supporting witness described how the applicant accompanies the sponsor to the beach, with their dog, and walks and waits while he surfs with friends.
25. Lengthy letters of support were provided by the sponsor's sister and brother-in-law, who live in Victoria, in which they describe visits by the parties to them, and their visits to the parties in Queensland since 2015, and attest to the genuineness of the parties' relationship. The sponsor's brother-in-law provided detailed arguments in support of his observation that the relationship is committed and long-term, including the parties' purchase of a property on acreage, in a rural hamlet near a beach, where they are developing vegetable gardens.

26. When asked about the applicant's family in the Philippines, the sponsor stated that he has not met them in person. He stated that while he spent time with the applicant before she came to Australia, up to six times a year from 2011, this was in Malaysia, specifically Kuala Lumpur, where she worked and through which he transited for work purposes. The applicant advised that the sponsor speaks often with her children and mother via Skype, and the sponsor talked about the applicant's children with familiarity as to their ages, whereabouts, careers and activities.
27. The Tribunal is satisfied that the parties represent themselves to other people as being in a de facto relationship with each other; that the opinion of their friends, acquaintances and family members is that they are in a de facto relationship; and that they plan and undertake joint social activities as a couple.

Nature of persons' commitment to each other

28. The parties have been in a relationship since 2011 and have lived together in Australia since October 2015.
29. From their written relationship statements, their presentation and telling of their story at hearing, the Tribunal is satisfied that the parties are in a committed relationship that has developed over seven years, and that they have provided and continue to provide each other with companionship and emotional support.
30. The sponsor described how the applicant has cared for him through illnesses including a recurring lung infection and the effects of his neck and back injuries. The applicant described how the sponsor has been caring and solicitous of her welfare since she met him, and has ensured all her needs are met. She described also how the sponsor waited for her and respected her commitment to working in Malaysia to support her children and her mother in the Philippines. The sponsor described how he met up with the applicant every year, up to six times, in 2011 and following years, in Malaysia, until her son graduated from military school and she agreed to join him in Australia.
31. The sponsor talked at hearing of how he would be devastated by separation from his companion and partner, after waiting so long for her to join him in Australia, and their establishing a life together. He stated that he has retired, and would accompany the applicant to the Philippines if necessary, but was concerned that he would not have access to an equivalent level of health care.
32. The Tribunal accepts that the parties have been in a relationship for seven years, and that they have lived together as a couple for three years. The Tribunal is satisfied that they have and continue to provide each other with companionship and emotional support, and that they see the relationship as long-term.

Findings

33. Having considered r.1.09A(3) matters the Tribunal finds that the applicant and the sponsor do have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they do live together or not separately and apart on a permanent basis.
34. The parties are not related by family.
35. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.

36. Therefore the applicant meets cl.820.211(2)(a).
37. The parties are over 18 years of age; the sponsor is the de facto partner of the applicant; and the applicant was the holder of a substantive visa at the time of application. Therefore the applicant meets cl.820.211 and cl.820.221.

Are the additional criteria for a de facto relationship met?

38. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, as noted, at the time of application the applicant and the sponsor were at least 18 years old.
39. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
40. Evidence was not provided at the time of decision that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
41. While the Tribunal accepts that the parties have been in a relationship since 2011, it does not find that they were in a de facto relationship before the applicant arrived in Australia in October 2015 to live with the sponsor. Before this time, when the parties were together, they stayed in hotels, mainly in Kuala Lumpur, and had not established a household together. The Tribunal accepts that the sponsor provided funds to the applicant to help her financially, but on their own admission this was mostly after she left her employment in Malaysia in March 2015. The parties made no claim that the sponsor supported the applicant financially in February 2015, or that they had otherwise pooled their finances at this time.
42. Further, there is little evidence that the parties functioned socially and were recognised and related to as a couple. Accordingly, while the Tribunal accepts that the parties were in a de facto relationship at the time of application and decision, and that they were in a relationship in February 2015, it is not satisfied that the applicant had been in the de facto relationship, as defined under s.5CB of the Act, for at least the 12 month period ending immediately before the date of the application.
43. Therefore, the issue before the Tribunal is whether the visa applicant can establish compelling and compassionate circumstances for the grant of the visa: r.2.03A(3). The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211.
44. As noted above, the Tribunal found the applicant and the sponsor open and forthright at hearing, accepted their testimony as sincere and truthful, and found their story of waiting for each other compelling. The Tribunal further found the high level of support for the parties exhibited by family and friends compelling. The Tribunal accepts that the refusal of the applicant's visa would adversely affect the parties' friends and the sponsor's family members, who relate to the parties as a couple, as well as the parties.

45. The parties have been in a relationship for over seven years. In the three years they have lived together in Australia they have established a lifestyle together based around their vegetarianism, their vegetable garden, their friends, and the beach. The Tribunal accepts that the sponsor, who is retired, would be devastated by separation from the applicant at this stage of his life, and that his health needs are such that he has cause to be concerned about leaving Australia. The Tribunal finds that the parties are reliant on each other for care and emotional support, as well as financial and practical support.
46. Accordingly, the Tribunal is satisfied that there are compelling and compassionate circumstances for the grant of the visa. For this reason the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).